Service Date: May 4, 1989

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application of DENNIS R. WASHINGTON, MONTANA RESOURCES, Inc. and MONTANA RESOURCES PARTNERSHIP For an Order Determining That Such Persons, Are Not a Public Utility Subject to the Jurisdiction, Control or Regulation of the Commission.	))))))))	UTILITY DIVISION DOCKET NO. 89.1.1 ORDER NO. 5408

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ORDER DENYING EXEMPTION

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BACKGROUND

Dennis Washington, Montana Resources, Inc. (MRI) a Montana Corporation and Montana Resources Partnership (jointly "Applicants") filed an application with the Montana Public Service Commission ("Commission") on January 12, 1989. The application requested that the Commission issue an order pursuant to § 69-3-111, MCA, determining that the Applicants, jointly and severally,

are not a public utility subject to the jurisdiction of the Commission.

The application represented that Applicants own, control and claim an undivided interest in certain plant, equipment and water rights used for collection, storage and transmissionof water at and between points located in Deer Lodge County and Silver Bow County, commonly known as the Silver Lake Water System (SLWS). Applicants claimed not to be presently operating as a public utility.

Applicants proposed to enter into a lease/option agreement with Butte Water Company (BWC), a public utility subject to Commission jurisdiction, under which BWC would lease 11/18ths interest in the SLWS for a period of ten years at a rental to be approved by the Commission, with an option to purchase this 11/18ths interest at the conclusion of the lease term at a purchase price subject to approval by the Commission.

Under this proposed lease/option agreement, BWC and Applicants would operate and jointly use the SLWS, the 11/18ths for BWC's Butte, Montana customers and the Applicant MRI's 7/18ths for its unidentified uses.

Applicants requested that the Commission give notice of the application by entry on the Commission agenda and that the Commission issue its order pursuant to Applicant's request.

As requested, notice of this application has been given by entry on the agenda on May 1, 1989. This agenda was mailed to the agenda service list including the Montana Consumer Counsel.

The application was not supported by exhibits and data in accordance with Commission practice. The Commission met at duly

scheduled and publicly noticed work sessions and directed the staff to request specified information. Pursuant to Commission practice and ARM § 38.2.3301(2), the Commission staff propounded numerous data requests in an effort to garner relevant details. The staff also obtained the proposed lease agreement and terms required for a determination under § 69-3-111, MCA.

The Commission and/or the Applicants have sent all documents pertinent to this application to the Montana Consumer Counsel and other interested parties on the service list, including news media. There have been numerous newspaper articles on this application within the area potentially affected by this decision.

On April 24, 1989 Applicants filed a Motion for a Protective Order and Request for Oral Argument, pursuant to Rule 26(c), M.R.Civ.P., alleging that the Commission staff should not be permitted to engage in further discovery activity, that matters involving the acquisition of the SLWS are not relevant and that the Applicants and other persons should be protected from "annoyance, oppression and undue burden and expense and from the involuntary disclosure of confidential and commercial information which may not be disclosed in these proceedings."

FINDINGS OF FACT

The Commission has jurisdiction over the subject matter of the application pursuant to § 69-3-111, MCA.

Proposed Lease Agreement

The proposed lease agreement is required under § 69-3-111(2), MCA. This lease agreement provides that Washington will lease to BWC an undivided 11/18ths interest in and to the SLWS, subject to any liens or restrictions of record for a period of 10 years at an annual lease rental payment by BWC to Washington in the amount of $845,863.00, payable in monthly installments of $70,488.60. The proposed lease further requires BWC to assume sole responsibility for operation of the SLWS and to enter into a separate operating agreement with MRI for use of the water from SLWS according to respective separate interests and for division of operating and maintenance expenses and necessary capital improvements, pursuant to the interests of BWC and MRI. The lease promises an average minimum flow of 11,000,000 gallons of water per day at a take off point from the 36" water transmission line near the Summit Valley pump station. Neither Washington nor MRI would otherwise warrant the quantity or quality of the water from the SLWS.

The proposed lease further discloses that there is an ongoing water adjudication with third-party claims to the SLWS water. Yet, upon execution of the lease, MRI would convey 11,000,000 gallons per day, "more or less," with a reversion to MRI if the lease is terminated.

According to the lease, Washington and BWC would enter into a separate agreement in which Washington would "provide certain loans" to BWC for utility plant facility improvements. Any breach or default of this separate agreement would constitute a breach of the lease.

According to the lease, Washington may terminate this lease if there is any attempt on the part of a state court or the Commission to impose any regulatory authority directly or indirectly over either Washington or MRI by reason of this lease. Further, if the Commission or any state court should by order or regulation attempt to change, or actually do so, any of the terms, conditions or provisions of the lease, then either party to the lease may terminate the lease.

Some other pertinent provisions of the proposed lease include the following: (1) BWC would pay 11/18ths of all taxes, with proration between Washington and BWC for 1989 and for any year in which the lease may terminate; (2) BWC would pay 11/18ths of total operating and maintenance expenses of the SLWS including cost of utilities and insurance required under the agreement; (3) BWC would make any improvements, with permission from Washington, which would become the property of Washington at the termination of the lease, unless otherwise agreed in writing; (4) BWC would maintain insurance for personal and property liability and for full coverage on the lease premises; (5) BWC would fully indemnify and hold Washington harmless from all claims whatsoever; and (6) BWC would repair and restore damaged premises without abatement of rent or any of its obligations due to the damage or destruction, and any amounts not covered by insurance would be the responsibility of BWC.

The proposed lease contains the following default provisions: (1) If BWC abandons the leased premises, fails to pay rent after 10 day's written notice from Washington, or otherwise breaches its agreements for 180 days after written notice from

Washington, then Washington, in addition to other legal remedies, shall have the right to terminate the lease and reenter the premises and BWC shall surrender the premises to Washington, with Washington's right to a deficiency; (2) if Washington fails to provide water from the SLWS as agreed for a period of 180 days after written notice from BWC or breaches other terms of the lease for a period of 180 days after written notice from BWC, then BWC may terminate the lease or negotiate a rental reduction to reflect the amount of water available to BWC from the SLWS as the sole option for insufficient water and may pursue all other legal remedies as to any other breaches. Any regulatory action by any court or the Commission affecting the lease terms could result in termination by either party upon 30 days written notice.

Responses to Data Requests

Applicant Dennis Washington through his attorney responded that he owned 11/18ths interest in the SLWS and MRI owned 7/18ths interest, and that Montana Resources Partnership has no present interest but may acquire MRI's interest. Applicants through Washington objected to requests as to acquisition and ownership interests since purchase in December, 1985, and refused to provide pertinent documents (Data Request-Response PSC-1).

Washington also responded that the SLWS is used by MRI for industrial purposes, by water rights holders for irrigation, and by the Anaconda, Montana water utility system |also owned and operated by BWC¬, as needed on a standby basis (Data Request-Response PSC-2).

Pursuant to Data Requests No. 3, Washington produced an option agreement which would allow BWC the option of purchasing

Washington's 11/18ths interest in the SLWS at the purchase price amount of $6.9 million, beginning with the date of the Option Agreement and expiring on an unspecified date.

Washington responded that he could not yet produce Exhibits A and B (real and personal property lists) because they were not yet prepared, but that they would be submitted for approval in a rate filing if the exemption was granted. Washington expressed the understanding that an exemption did not represent preapproval as to the prudence of BWC's integrating the SLWS. Washington then responded that to the extent Commission action would change the provisions of the lease, "once it has been approved by the Commission" |in a subsequent rate filing, not in the exemption process¬, this Commission action would constitute a default of BWC, allowing Washington to terminate the lease (Data Request-Responses PSC-4, 5, 6 and 7).

Washington represented in a response that there were no apparent negotiations on the proposed lease agreement, but rather a circulation of the draft and preliminary approval by telephone from representatives of Applicants and BWC (Data Request-Response PSC-8).

The Applicants refused to disclose the actual original acquisition cost to Washington, claiming irrelevance to the proceeding (Data Request-Response 10).

Washington represented that he would offer a proposed operating agreement in the rate proceedings by BWC for Commission approval of the proposed lease agreement, pursuant to advice of counsel. He also represented that he would present a specific method for division of the SLWS operation and maintenance expenses

in the rate proceedings for Commission approval of the proposed lease agreement (Data Request-Responses PSC-11 and 12).

Washington still held title to SLWS water rights as of April 21, 1989. Yet, he claimed on that date that he had sold 23,321,419 gallons per day to MRI and would file conveyance documents and certificates of transfer before execution of the lease agreement (Data Request-Response 13).

Water rights adjudication is proceeding on the Clark Fork River Basin above the Blackfoot River, Docket 76G. Washington represents that MRI will carry the water rights claims to satisfy delivery of the 11 million gallons per day, subject to a change of place of use and change of purpose of use from industrial to domestic. Water delivery under the proposed lease will begin before final approval from the legislature (Data Request-Response PSC-14).

Applicants refused to supply data on the 1986, 1987 and 1988 tax liability for real and personal property taxes and on the entities paying such taxes (Data Request-Response PSC-16).

Washington represented that Butte Water Company is not a party to the proceeding, although BWC and Washington alone are proposed parties to the lease agreement (Data Request-Response PSC-18). Washington further could not speak to whether BWC would have an available source of supply if the lease to the SLWS were terminated (Data Request-Response PSC-21).

The board of directors of BWC is composed of Dennis R. Washington, Dorn Parkinson and James W. Chelini. The board of directors of MRI is composed of Dennis R. Washington, Dorn Parkinson and Frank Gardner (Data Request Response PSC-28, prepared in part by James W. Chelini, BWC).

James Robischon is the attorney representing Dennis Washington, MRI and the Montana Resources Partnership in the application. BWC has no legal counsel in this matter (Request-Response PSC-30).

DISCUSSION, ANALYSIS AND FURTHER FINDINGS

Applicable Law

The Applicants apply for nonpublic utility status based upon § 69-3-111, MCA, requesting an exemption from § 69-3-101, MCA, which defines "public utility." Relevant provisions follow:

> 69-3-101. Meaning of term "public utility". (1) The term "public utility" ... shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees ... that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal: ...
>
> (e) except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities, towns, and villages or elsewhere; ...
>
> (2) The term "public utility" does not include:
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> (a) privately owned and operated water, sewer, or combination systems that do not serve the public;
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> (b) county or consolidated city and county water or sewer districts as defined in Title 7, chapter 13, parts 22 and 23; or
>
> (c) a person exempted from regulation as a public utility as provided in 69-3-111.

69-3-111. Persons with interest in property leased or to be sold to public utility -- exemption. (1) Upon application, the commission, by order, may determine that any person not otherwise a public utility is not a public utility subject to the jurisdiction, control or regulation of the commission under this title, solely because such person owns or controls any plant or equipment, any part of or undivided interest in a plant or equipment or any water right described in 69-3-101:

(a) which is leased or sold or held for lease or sale to any public utility or other lessee; or

(b) the operation and use of which is vested by lease or other contract in a public utility or other lessee; or

(c) for a period of not more than 90 days after termination of any lease or contract described in subsection (1)(a) or (1)(b) or after such person gains possession of such property following a breach of such lease or contract.

(2) Any order once issued may not be revoked or modified by the commission unless there is a material change in the lease or contract terms forming the basis of such order.

(3) The commission may, upon application by a public utility, issue its order approving the terms of any lease or contract described in subsection (1)(a) or (1)(b) for the purpose of qualifying any party thereto for an exemption by the United States securities and exchange commission, or its successor, from the federal Public Utility Holding Company Act of 1935.

(4) A public utility, as lessee of any plant or equipment, any part of, or undivided interest in, a plant or equipment or any water right described in 69-3-101 which is subject

> to any lease or contract described in this section, shall comply with this title, regarding such plant, equipment, or water right.
>
> (5) Nothing in this section may be construed to alter or modify the authority of the commission to regulate the rates and services of a public utility that is subject to the provisions of this title.

The Applicants have incorrectly applied for a protective order under Rule 26(c), M.R.Civ.P. instead of the applicable provision, § 69-3-105(2), MCA. Because the Commission finds adequate basis for this order, Applicants' motion for a protective order is moot. However, the Commission notes that under § 69-3-105(2), MCA, the Commission may issue a protective order when necessary to protect trade secrets as defined in § 30-14-402(4), MCA. The Commission does not find that this information requested qualifies as a trade secret and finds that it is in fact relevant. Original acquisition cost of property that may become actually used and useful for the convenience of the public is within the scope and relevancy of a Commission inquiry. See § 69-3-109, MCA.

This requested information becomes particularly relevant when the terms of the lease, including rental payments would become the basis of a § 69-3-111, MCA, order, and further material when the lease also provides for termination if the Commission or a

court should later determine that the rental payment terms are not reasonable.

A protective order under § 69-3-105, MCA, involves shielding the trade secret information from the public. It does not shield the Applicants from the necessity of providing requested information to the Commission. The Commission (and its staff) are not parties in this proceeding, but rather are exercising the power of discretion conveyed under Title 69 and § 69-3-111, MCA.

Legislative History

To determine the applicability of a § 69-3-111, MCA, exemption from public utility status under the circumstances in this docket, the Commission examines the legislative history of this statute and its application in any preceding matters before the Commission. Montana Power Company proposed the basic legislation in the 1985 session as a response to a Commission determination that Colstrip 4 was excess power, not used and useful to Montana ratepayers. Montana Power Company (MPC) had determined the need to sell the facility to relieve the financial burden and to lease it back for sale of power outside Montana.

The Business and Labor Committee held a hearing on HB 852 on February 21, 1985. Rep. John Harp explained that this bill

would revise the definition of "public utility" so that the Commission "may decide" that the definition does not include a "person who owns equipment leased to a public utility." Rep. Harp said that the intent was to provide a "financing tool" to facilitate Montana Power Company's sale and "leveraged lease" of Colstrip 4 and "work in the purchaser's interest" and also benefit MPC's |financial¬ position. The bill's primary proponent (and beneficiary) was the utility Montana Power Company, which proposed to sell Colstrip 4 and lease it back. The purchasers and proposed lessors, i.e., investors' interest was economic only. Attorney Opal Winebrenner on behalf of the Commission supported the bill with amendments requiring "full disclosure ... surrounding the request from a utility." Jim Paine, Montana Consumer Counsel, also supported HB 852 as giving the Commission "a needed option" to enable MPC to "negotiate a transaction" because of investors' concern with being treated as a utility. The leveraged lease would allow MPC to lower the cost of the plant which had been determined not used and useful for Montana ratepayers. MPC required relief since it could not recoup the expenses from its ratepayers. The resulting bill was passed with amendments, including a provision that an order granting the exemption would be based upon the lease,

and any material changes would result in revocation of the order.

PRECEDENT: MPC's Application

On November 8, 1985 MPC filed an "... Application ... for Authority to Issue Securities, Approval of the Terms of a Leveraged Lease and for Exemption from Regulation for Certain Parties" (Docket No. 85.11.45). MPC proposed to sell facilities of Colstrip 4 to "Owner Trustees acting under trust agreements for Owner Participants," i.e., institutional equity investors which would purchase 25 percent of MPC's interest. The remaining 75 percent would be raised by selling notes to institutional investors, i.e., Lenders. MPC proposed to lease back facilities for $30 million per year, 25 year term. With its application MPC submitted detailed terms of the proposed transaction, in addition to the lease agreement provision. MPC agreed that following the closing of the transaction it would supply copies of all documents as executed, including the trust agreements, indentures, tax indemnity agreements, ownership rights agreement and lease. MPC's application additionally requested that the Commission approve the terms of the lease for the purpose of qualifying parties for an exemption by the United States Securities and Exchange Commission

(SEC) from the Federal Public Utility Holding Act of 1935. MPC's application was on behalf of the investors, i.e. the Owner Trustees, Owner Participants, Lenders and Indenture trustees that they be determined not to be public utilities.

MPC requested that the Commission give notice of the application by placing it on the agenda and then issue the order. Notice was given by inclusion on the agenda.

By Order No. 5168 dated November 27, 1985, the Commission determined that the Owner Trustees, Participants, Lenders and Indenture Trustees were not public utilities, and approved the terms of lease for qualification for an exemption under the SEC. The Commission found that the leveraged lease transaction would remove Colstrip 4 from being considered as an addition to MPC's plant dedicated to providing service to Montana consumers; MPC intended to sell Colstrip power outside Montana (Finding of Fact No. 15). The Commission found (and MPC concurred) that any power from Colstrip 4 sold to Montana consumers would be within the jurisdiction of the Commission, despite the exemption from security laws under the acceptance of the leveraged lease.

Comparison to Precedent

The Commission hereby finds that this application for an order determining that Applicants are not a public utility subject to Commission jurisdiction does not follow the legislative intention of § 69-3-111, MCA, nor does it follow the precedent before the Commission.

Some comparison of the present application to that of MPC will explain the above finding. MPC applied for the exemp tion for certain parties, i.e., proposed third-party institutional investors which would purchase MPC's 30 percent undivided interest in Colstrip 4 and certain related common facilities, which were not needed for or producing power for Montana ratepayers. MPC then proposed to lease the facilities back for a 25 year term and sell the power outside Montana. MPC would be relieved of a substantial financial burden and placed in a better position.

In this application, Dennis Washington, Montana Resources, Inc. and Montana Resources Partnership, allegedly joint owners of an undivided interest in the SLWS, applied on their own behalf. They represented in data responses that the public utility BWC is not a party to the application. In the precedent, it was MPC, the public utility, which stood to benefit financially and thus applied. Its ratepayers would not be affected except indirectly. To the extent Montana ratepayers would use any power,

the Commission would assert jurisdiction. In this application, BWC, the regulated utility is not only not a party, but it also is not represented by counsel. BWC has not participated in meaningful negotiations on the lease agreement and makes no showing of an arm's length transaction which will benefit either the company or the ratepayers.

The MPC application involved full disclosure. Here, there is avoidance of the full disclosure required in this monopoly situation. Dennis Washington, the party who stands to gain, is interlocked in directorates of both the utility and MRI and has himself applied for an exemption, owning substantial water rights and part of the delivery system. As such, he has a clear monopoly on the water system in his own name. He is the only stockholder in the utility BWC. His responses to data requests make clear that he has no intention of revealing his original acquisition cost of the assets of SLWS. In leasing these assets, he would be a public utility under the definition of § 69-3-101, MCA. The Commission may ascertain the value of the property of public utilities, pursuant to § 69-3-109, MCA, but value may not exceed the original cost of the property. By seeking this exemption and requiring the Commission, if it exempts him, to do no act directly or indirectly regulating him, Washington apparently seeks to avoid full

disclosure of his original acquisition cost of the SLWS. There would be no basis to determine if BWC was asked to pay a reasonable rent. Meanwhile, Washington would gain a substantial, unregulated profit, with the threat that if the Commission asked reasonable valuation questions upon a subsequent BWC rate application to get the ratepayers to pay for the rent and other expenses, then he would terminate the lease and leave BWC's ratepayers high and dry.

Some substantial inconsistencies occur in the application, lease and data responses that are further evasive. Dennis Washington, MRI and Montana Resources Partnership claimed a joint undivided interest in the SLWS in the application on January 12, 1989. Yet, according to the data responses, Montana Resources Partnership does not exist at present. If it were to exist in some future time, there is no indication of what its composition would be. The Commission will not grant an exemption to a nonexisting entity.

MRI is not proposed as a lessor, since it is Washington's undivided 11/18ths interest which would be conveyed. Under § 69-3-111(2), MCA, the lease terms form the basis of any order exempting an applicant. Therefore MRI does not qualify as an applicant for exemption since it is not a proposed lessor. Ostensibly, MRI is

proposed as having at least 11 million gallons per day in water rights to convey to BWC. As late as April 21, 1989 all the water rights were in Washington's name and he alone is the lessor on the proposed lease. Either this transaction was not carefully contemplated, or else it is a rather elaborate avoidance of utility regulation. MRI has not established a reasonable basis for exemption under § 69-3-111, MCA.

Finally, Washington as the proposed lessor owns and controls all the rights to the 11/18ths of the SLWS which would be subject to the lease, as well as all the water rights as of April 21, 1989, the date of data response filing. He is also the principle stockholder of BWC and is the majority stockholder in MRI as of April 21, 1989. Therefore, he controls a substantial monopoly in available water service. He is far from filling the mold of the institutional investors and lenders on whose behalf MPC applied for the exemption. Their only interest was in providing investment monies to MPC and receiving a reasonable negotiated repayment through rental payments, secured by trust indentures and ample agreements (i.e., a leveraged lease transaction).

Washington proposes that this Commission exempt from public utility status himself, a nonexisting entity and a nonlessor entity on the basis of this application under § 69-3-111, MCA.

This is not a leveraged lease transaction involving third-party disinterested investors who do not presently own or control public utility property. In the MPC application, the Commission stated that the ratepayers would not be responsible for MPC's lease payments, and that the PSC would employ all available measures to assure that Montana ratepayers would not subsidize the plant. Here, Mr. Washington has made it clear that the ratepayers of the BWC where he is the major stockholder will be repaying all the expenses associated with the rent, the integration to SLWS, substantial undisclosed operating expenses, taxes, capital improvements (which will inure to his benefit), etc. If the Commission thwarts him in any way, he will take his water elsewhere. The Commission finds that there are not even ephemeral promises or protections to safeguard the Butte Water Company customers from unreasonable charges and/or service termination. There is an overriding threat inherent in the lease that any attempted regulation by the Commission of Butte Water Company's rates and service vis a vis the expenses associated with Silver Lake Water System and lease would be cause for termination of the lease. This provision is contrary to public policy and in contravention of § 69-3-111(5), MCA, which states: "(5) Nothing in this section may be construed to alter or modify the authority of

the Commission to regulate the rates and services of a public utility that is subject to the provisions of this title." The Applicants' proposed lease would seriously modify and impair the Commission's authority to regulate Butte Water Company in balancing the interests of the company and its customers pursuant to the Commission's duties under Title 69.

The Commission finds that if this application were granted it would open up a Pandora's box not contemplated by the statute nor established by any precedent at the Commission. Washington or any proposed lessor with ownership, operation or control of any part of a plant, equipment or water right within the state for the production, delivery or furnishing of water for or to others, pursuant to § 69-3-101, MCA, could approach the Commission with a series of leases and apply for exemption(s). This would be a circumvention of public utility regulation not contemplated by § 69-3-111, MCA.

The Commission finds that § 69-3-111, MCA, is limited by legislative history and Commission precedent to the very limited situation as employed by the Montana Power Company application. In the MPC application, MPC was enabled to sell its interest to third-party investors, thus relieving it financially. The lease back from the purchasers enabled MPC to operate Colstrip 4 and benefit

the utility at no cost to the Montana ratepayers. None of the Applicants here are third-party disinterest ed investors. Therefore, the Commission will deny the application for exemption.

The Commission bases its denial of this application for exemption from public utility status upon the fact that the application does not qualify, pursuant to the inherent requirements of § 69-3-111, MCA, and precedent.

CONCLUSIONS OF LAW

1. The Commission is vested with the power to exercise discretion to determine whether any person not otherwise a public utility may be exempted from public utility regulation by the Commission pursuant to § 69-3-111, MCA, for the purposes of entering into a lease arrangement.

2. Section 69-3-111, MCA, does not provide for or require a hearing for a determination on the application for exemption.

3. Notice was provided by placement on the agenda, and by the scheduling of open work sessions at the public agenda meetings. Further notice occurred in news stories pursuant to § 2-3-104(4), MCA, in newspapers within the general area to be affected by this decision.

4. The exercise of this discretion was granted as a financing tool to enable Montana Power Company to sell Colstrip 4 to investors and lease it back, thus relieving the public utility of a financial burden, according to the legislative history of HB 852 on February 21, 1985.

5. The Commission has exercised this discretion granted under § 69-3-111, MCA, on one single application by MPC in Docket No. 85.11.45, Order No. 5168, in which the utility applied on behalf of disinterested third-party investors so that they could invest in Colstrip 4 and relieve the utility of this burden. This application also involved a request for exemption of these investors by the Securities and Exchange Commission from the federal Public Utility Holding Company Act of 1935. The Montana ratepayer was not affected by the sale/lease back except indirectly in having the utility on more solid financial ground.

6. The Applicants in this docket do not qualify for an order exempting them from public utility status pursuant to § 69-3-111, MCA, its legislative history and precedent.

7. Pursuant to § 69-3-101, MCA, the term "public utility" includes every corporation, company, individual, association of individuals and their lessees, trustees or receivers that now or

hereafter may own, operate or control any plant or equipment, or part thereof, or any water right within the state for the delivery or furnishing of water for business, manufacturing, household use or sewerage service to other persons, firms, associations or corporations.

8. When an order under § 69-3-111, MCA, is issued granting an exemption, the lease terms form the basis of the order. The lease terms proposed herein, if granted, would be in contravention of public policy and § 69-3-111(5), MCA, in attempting to alter or modify the authority of the Commission to regulate the rates and services of the public utility, BWC, as a party to the lease.

9. The correct procedure for application for a protective order before the Commission is pursuant to § 69-3-105(2), MCA, for protection of trade secrets as defined in § 30-14-402(4), MCA. This order renders moot Applicants' Motion for a Protective Order under Rule 26(c), M.R.Civ.P., and the erroneous application is hereby deemed denied.

10. Nothing herein prevents Applicants from entering into any agreements related to their interests in water and any water delivery system. However, they will be subject to public utility regulation under Title 69.

ORDER

IT IS HEREBY ORDERED THAT:

The application on behalf of Dennis R. Washington, Montana Resources, Inc. and Montana Resources Partnership for an order determining that such persons are not a public utility subject to the jurisdiction, control or regulation of the Commission is DENIED.

Done and Dated this 4th day of May, 1989 by a vote of 5 -0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
CLYDE JARVIS, Chairman

_____
HOWARD L. ELLIS, Vice Chairman

_____
JOHN B. DRISCOLL, Commissioner

_____
WALLACE W. "WALLY" MERCER, Commissioner

_____
DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)